Supreme Court, U.S.
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No. 90-206

In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA BACKIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a period of delay between her refusal to testify before the grand jury and the commencement of a civil contempt proceeding against her, even though the legal and factual bases on which petitioner sought to justify her refusal to testify had been fully developed at a prior hearing on her motion to quash the grand jury subpoena.

2. Whether the court of appeals unduly restricted the scope of the civil contempt proceeding on remand.

3. Whether, before a grand jury may enforce a testimonial subpoena to a lawyer, the grand jury must satisfy a court that the lawyer's testimony is the only means available for obtaining information necessary to return an indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 72a-104a) is reported at 906 F.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1990. Pet. App. 72a. The petition for a writ of certiorari was filed on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following her refusal to testify before a grand jury, petitioner was held in civil contempt by the district court after a proceeding that was closed to the public. The court of appeals vacated the civil con-

tempt order and remanded for a proceeding open to the public except to the extent necessary to protect grand jury secrecy. All other rulings of the district court were upheld on appeal.

1. The relevant facts are summarized in the opinion of the court of appeals. Pet. App. 74a-78a. Petitioner is an attorney who has represented a number of individuals involved in the Puerto Rican independence movement. On September 11, 1989, she was served with a subpoena duces tecum ordering her to testify and produce documents before a grand jury sitting in Philadelphia. The grand jury sought information regarding the authenticity and disposition of certain documents pertaining to an investigation of one of petitioner's clients who had jumped bail. Other witnesses before the grand jury had testified that the documents had been in petitioner's custody. In litigation involving those other witnesses, who were also lawyers, the court of appeals held that the documents were not privileged. See *In re Grand Jury Matter* (*Chomsky*), No. 89-1405 (3d Cir. June 16, 1989).

In response to petitioner's indication that she would invoke her Fifth Amendment right not to testify if she were called before the grand jury, the government requested the issuance of an immunity order compelling petitioner's testimony. Petitioner then filed a comprehensive motion to quash the grand jury subpoena raising numerous grounds. More than 40 affidavits from clients and members of the legal community were appended to the motion. The affidavits attested to petitioner's reputation and character, and they set forth various reasons why petitioner should not be required to testify. The government answered the motion and a closed hearing on the motion was held on January 31, 1990. See Pet.

App. 23a n.1. Petitioner proffered no witnesses. On March 6, the district court denied petitioner's motion and directed that she appear and give testimony before the grand jury.[1]

Petitioner appeared before the grand jury on March 20. She read and distributed to the grand jurors a prepared statement reiterating her objections to giving testimony and ultimately refused to answer the questions asked. At the conclusion of petitioner's appearance, at approximately 3:50 p.m., the parties came before the district court, and the government moved for a rule to show cause why petitioner should not be held in contempt. The district court denied petitioner's request for additional time to prepare, and a hearing on the motion began at 4:15 p.m. Over petitioner's objection, the hearing was closed to the public. The court denied petitioner's request to secure two types of witnesses: experts on the grand jury system to explain why petitioner should not be required to testify and members of the bar to attest to petitioner's reputation and work record. The district court held that such testimony was irrelevant to the contempt proceeding.

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[1] In response to petitioner's indication that she would object to testifying on the ground that illegal electronic surveillance led to her being subpoenaed, the government filed an affidavit averring that neither the FBI case agent nor the Assistant U.S. Attorneys involved in the case were aware of any electronic surveillance connected with the matter under investigation by the grand jury. Petitioner's motions for disclosure of electronic surveillance and to quash the subpoena on the grounds of illegal surveillance were denied on March 6, 1990. A renewed motion by petitioner for disclosure of electronic surveillance was met by a supplemental affidavit of denial by the government, and the renewed motion was denied. The court of appeals upheld those rulings, and petitioner does not raise any issue respecting those matters.

The court then put to petitioner the same questions that had been asked in the grand jury proceeding. After petitioner twice stated that she would adhere to her refusal to answer the questions, she was held in contempt. Incarceration was stayed pending appeal.

2. The court of appeals ruled that the contempt proceeding should not have been closed to the public, except to the extent necessary to protect grand jury secrecy. Pet. App. 86a-88a. It therefore vacated the order holding petitioner in contempt and remanded for a new hearing. The court, however, addressed and rejected all the other claims raised by petitioner.

The court of appeals found that the due process requirement of pre-hearing notice was satisfied in this case even though the hearing was held promptly after petitioner refused to testify before the grand jury. Pet. App. 79a-86a. The court concluded that the timing of the hearing "in no way prejudiced [petitioner's] ability fairly to present all defenses available to her," since all of those defenses had been raised and fully presented in connection with petitioner's motion to quash the subpoena. *Id.* at 84a. The court found that the only reason petitioner sought additional time was to secure live-witness testimony. Since that testimony would have been cumulative in light of the affidavits already presented, the court of appeals held that the district court did not abuse its discretion by refusing to allow petitioner to call witnesses. *Id.* at 85a-86a.

The court of appeals also rejected petitioner's claim that the issuance of the subpoena for her testimony was an abuse of the grand jury process. She based that claim on three contentions: first, that her testimony was unnecessary; second, that the government had subpoenaed her because it wished to obtain

evidence for use at trial; and third, that the government was pursuing petitioner in order to punish her for her efforts on behalf of those seeking independence for Puerto Rico. Pet. App. 88a-91a. The court of appeals held that the government had shown that each document or item of testimony sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose. The court declined her suggestion that it should impose additional requirements on the government, either because of petitioner's status as an attorney who had represented the target of the grand jury investigation, or because of her involvement with politically controversial clients. *Ibid.*

The court of appeals stated that the district court, on remand, should "afford[] [petitioner] the opportunity to reiterate in public her anticipated refusal to answer questions before the grand jury and to have the consequent adjudication of contempt occur in open court." Pet. App. 104a. Although the court ruled that "by the time of this second hearing all issues raised centering on just cause will have been resolved and need not be considered further," *id.* at 88a n.4, the court did not foreclose the district court from reconsidering any issue if petitioner could persuade the district court of the need to do so.

ARGUMENT

1. Petitioner first argues (Pet. 10-14) that the district court should have waited five days from the date that she refused to testify before holding the contempt proceeding. She relies on the general five-day notice requirement established by Fed. R. Crim. P. 45(d) and Fed. R. Civ. P. 6(d). Those Rules provide, in general, for at least five days' notice before a hearing on any motion. As petitioner concedes, however, no court has held that the five-day notice period applies rigidly to civil contempt proceedings brought, as in this case, under 28 U.S.C. 1826. First, both Rule 45(d) and Rule 6(d) state that a different time period may be fixed by order of the court. Moreover, the text of Section 1826 suggests that a shorter period will often be appropriate. Section 1826 states that when a witness "refuses without just cause shown to comply with an order of the court to testify or provide other information * * * the court * * * may summarily order his confinement." By authorizing summary contempt proceedings in the case of a witness's refusal to testify, Section 1826 contemplates that such proceedings often will be quite simple and can be held promptly after the witness's refusal to testify.

As the court of appeals held, Pet. App. 80a, the real issue here is whether petitioner was provided the notice required by the Due Process Clause: notice sufficient to provide her a reasonable opportunity to prepare and present a defense. See *Remington Rand Corp.-Delaware* v. *Business Systems, Inc.*, 830 F.2d 1256 (3d Cir. 1987). The period of notice required by due process varies with the circumstances of the case. Here, where all the factual and legal defenses that petitioner sought to assert had been fully aired

in connection with her motion to quash the subpoena and she had refused to testify despite an explicit court order to do so, the court of appeals correctly found no abuse of discretion in the district court's decision to hold a contempt hearing promptly after petitioner's refusal to testify. As the court of appeals found, Pet. App. 84a, the only reason petitioner gave for requesting additional time was that she wished to call live witnesses to give testimony recapitulating the contents of the affidavits that had been filed in connection with her motion to quash the subpoena. The district court, however, correctly concluded that it was unnecessary to hear that testimony, both because it would not establish a legal excuse for petitioner's refusal to testify, and because it was cumulative of the material already presented in detail in affidavit form. Because there was no need to hear that evidence, there was no reason to delay the proceedings to enable petitioner to summon her witnesses.

2. Petitioner also complains (Pet. 14-18) that the court of appeals effectively approved the incarceration of petitioner based on a secret contempt hearing by affirming the rulings the district court made at proceedings that were closed to the public. The court of appeals, of course, did not foreclose the district court from considering any issue further if it decides to do so. But even if the district court should decline to consider the merits of these issues further, there would be no abridgement of petitioner's right to a public hearing if the district court were to incorporate by reference into the public record all the discussion and rulings on those issues that had previously occurred in the non-public proceeding, excluding those portions necessary to protect grand jury secrecy. Such an approach would adequately serve

the purposes of a public contempt hearing: the need to assure accountability, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. See *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982). In any event, since the second contempt proceeding has not yet occurred, the question whether that proceeding will satisfy petitioner's rights to a fair and public hearing is not yet ripe for review.

3. Petitioner further argues (Pet. 19-29) that a higher standard of justification should be required for the subpoena in this case because the information sought involves petitioner's client, and because both she and her client are involved in politically controversial causes. The court of appeals required the government to show that the evidence sought was relevant to an investigation within the grand jury's jurisdiction and was not sought primarily for another purpose. Pet. App. 89a-90a. Petitioner, however, would require a further showing that the evidence is necessary for the return of an indictment and cannot be obtained from another source. Pet. 25-29. There is no precedent for such a requirement.[2] Nor is such a requirement necessary to protect the relationship between an attorney and her client or to protect the exercise of First Amendment rights.

In our legal system, it is the attorney-client privilege that serves the function of protecting the attorney-client relationship to the extent necessary in light of

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[2] Both the Second and Fourth Circuit decisions cited by petitioner as articulating a higher standard (Pet. 21 n.16, 25) have been vacated. *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (1985), vacated, 781 F.2d 238 (2d Cir. 1986) (en banc); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, vacated, 697 F.2d 112 (4th Cir. 1982) (en banc).

competing values. In this case, the attorney-client privilege has been held inapplicable to the evidence the grand jury is seeking, and petitioner does not contest that ruling. The contours of the attorney-client privilege reflect the degree to which society's interest in furthering the attorney-client relationship will be allowed to thwart the truth-seeking process. Petitioner offers no persuasive reason for creating a new privilege, which would serve the same purpose of protecting the attorney-client relationship but would strike a different balance between the need to shield that relationship and the grand jury's right to broad access to available evidence of crime. See *Branzburg* v. *Hayes*, 408 U.S. 665, 668 (1972).

Petitioner's allegation that the government issued the subpoena to punish her (or her client's) exercise of First Amendment rights provides no reason to require a higher standard for the issuance of the subpoena. Had petitioner elicited persuasive evidence to support her claims as to the true ground for the subpoena, she would have succeeded in having it quashed under the traditional standard, because she would have shown that it was issued for an improper purpose. Her failure on that score is attributable to the absence of evidence of an improper motive, not to any inadequacy in the standard employed to review the government's conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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